JAN 27 1947

No. 79

In The

Supreme Court of the United States

OCTOBER TERM, 1946

LEO H. STEELE,
Petitioner,

VERSUS

GENERAL MILLS, INC.,
Respondent.

PETITION FOR REHEARING

GENERAL MILLS, INC., *Respondent.*
By ALFRED McKNIGHT,
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January 24, 1947.

UTTERBACK TYPESETTING CO., 13 S. WALKER, OKLAHOMA CITY, 4, OKLA.

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No. 79

In The

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October Term, 1946

Leo H. Steele,
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VERSUS

General Mills, Inc.,
Respondent.

PETITION FOR REHEARING

Respondent General Mills, Inc., respectfully petitions the Court for a rehearing in the above cause and prays for a reconsideration of the opinion delivered January 6, 1947, for the following reasons:

I.

The decision leaves undecided by this Court the fundamental question of the interpretation of Section 6aa, Article 911b, Texas Revised Statutes.

We submit that the Circuit Court of Appeals did not directly consider or determine this question, which was the basis of respondent's defense in this action in the trial court and on appeal, but specifically stated that it did not enter

into a discussion of the question of whether or not the Railroad Commission was without authority to fix the rates of a contract carrier that was *not* in competition with common carriers. 154 Fed. (2d) 367, at page 372.

That Court apparently was so firm in its opinion that petitioner should not recover because of his conduct in bringing about the contract in question, that it proceeded, assuming that applicable rates had been duly established by the Railroad Commission, to deny recovery upon an application of the doctrine of *pari delicto*. This point was in fact a collateral or secondary issue in the case. Respondent has at all times primarily challenged the power and authority of the Railroad Commission, by reason of the specific terms of the Texas Statute, to fix rates for contract carriers who were *not* in competition with common carriers. This basic question was not determined by the Circuit Court and in effect was disposed of in this Court by following the opinion of the District Judge, without consideration of the merits of the question. Such a result in substance denies to respondent an appeal upon this important issue.

It is submitted that an examination of the final judgment in the trial court (R. 80) and the conclusions of law of the trial judge (R. 72-75) fail to disclose a specific consideration of the import of Section 6aa upon the point here urged or to interpret that statute insofar as the question of limited and qualified rate making power was delegated to the Railroad Commission. The trial judge did conclude that by Article 911b, the Texas Legislature conferred upon the Railroad Commission, the power and duty to regulate

all carriers, but that conclusion falls far short of interpreting Section 6aa as conferring power to fix rates for contract carriers, absent the fact of competition with common carriers. Respondent has never denied the right of the Railroad Commission to regulate all carriers as an exercise of the police power.

No decision of any Texas court and no decision of any other federal court has been cited to support the construction of Section 6aa, as granting or delegating to the Railroad Commission unlimited or unqualified power or authority to fix the rates of contract carriers or to fix rates of contract carriers who were *not* in competition with common carriers.

To our knowledge such a position has never before been asserted by the Texas Railroad Commission or any other person.

To the contrary, we refer to the article by Professor Edward W. Bailey, Professor of Law, University of Texas, found in Texas Law Review, Vol. XX, No. 2, issue of December, 1941, at pages 165, 171 and 172. The following extract is taken from the article of Professor Bailey bearing upon the exact point here involved:

> "Thus it is clear from the language of the new statute, as well as from the history of the period, that one of the predominant objectives of the new legislation was the protection of existing carriers, including the railroads, against unnecessary and harmful competition.

"This new motivation is apparent in the provisions of the Act empowering the Commission to fix rates for the motor carriers. Section 4(a) makes it the duty of the Commission to fix the rates and charges ' * * * of each motor carrier in accordance with the specific provisions * * * ' of the Act. Section 6aa imposes the duty on the Commission:

"' * * * to prescribe rules and regulations covering the operation of *contract carriers in competition with common carriers over the highways* of this state and (that) the Commission shall prescribe minimum rates, fares, and charges to be collected by *such contract carriers* which shall not be less than the rates prescribed for common carriers for substantially the same service' (Italics supplied).

"Thus the contract carrier, now for the first time brought within the regulatory powers of the Commission, is made subject to the rate-making power, *but only when it competes with the common motor carrier and then the power of the Commission is restricted by a prohibition against fixing the rates of the contract carrier at a level lower than that prescribed for the common carrier.* The intent to regulate the contract carrier to the end that the common carrier may be protected against ruinous competition is clear" (Emphasis last paragraph ours).

This Court in *Stephenson v. Binford*, 287 U. S. 251, 53 Sup. Ct. 181, 77 L. Ed. 288, clearly noted the qualification of competition with common carriers as prerequisite to the authority of the Texas Railroad Commission to fix the rates of private contract carriers, and a similar reference was made in *Texas & Pacific Ry. Co.* v. *Railroad Commission et al.*, 138 S. W. (2d) 927, at page 930.

We most respectfully urge that respondent and this Court ought not be finally bound by an implied interpretation of the Texas statute by the trial judge, but this Court should examine and determine the issue presented, otherwise an appeal is an empty gesture.

II.

The decision herein also leaves undecided by this Court the Related Constitutional Question of the violation of the Due Process Clause of the Fourteenth Amendment.

If Section 6aa be interpreted to delegate or grant to the Railroad Commission unlimited or unqualified power or authority to fix rates for *all* private contract carriers, we respectfully urge that the law must fall under the authority of *Smith* v. *Cahoon*, 283 U. S. 553, 75 L. Ed. 1264, and *Frost* v. *Railroad Commission*, 271 U. S. 583, 70 L. Ed. 1101. Neither the opinion of the Circuit Court nor that of this Court passed upon this question, which has been urged by respondent at all times, and thus again respondent is denied consideration and determination of this major question upon appeal and left bound by the decision of the court of first instance. Certainly this issue was not one of local law.

III.

The decision herein leaves undecided by this Court the question of the legal sufficiency and legality of the orders of the Railroad Commission, should they be construed as actually fixing rates applicable to the service performed by petitioner.

The order of the Railroad Commission (Motor Freight Class and Commodity Tariff No. 1-A, effective July 26, 1940) asserted to be a general rate making order applicable to the operations of the petitioner, was entered long before the negotiations between the parties in this case, and long before his type of service was contemplated. The respondent was not a party to the proceeding in which that order was entered nor was respondent a party to the proceeding in which petitioner secured his permit. Upon determining the application of petitioner for a permit, there were no findings of fact by the Railroad Commission that brought the operations of petitioner within the purview of the rate making power of the Railroad Commission. This issue of the validity of these orders, if construed as applicable to the service performed by petitioner, which issue has also been urged by respondent at all times, was not determined by either the Circuit Court of Appeals or by this Court.

Under the authority of *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 79 L. Ed. 446 and *Wichita R. R. & Light Co.* v. *Public Utilities Commission of the State of Kansas*, 260 U. S. 48, 67 L. Ed. 124, we believe the said orders are clearly void insofar as the same purport to fix rates applicable to the contract of carriage involved in this case. See also: *Railroad Commission of Texas* v. *Fort Worth and Denver City Rail-*

way Co., 161 S. W. (2d) 560, writ of error refused, want of merit, Supreme Court of Texas; *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Ry. Co. et al.*, 167 U. S. 479, 42 L. Ed. 243; *Texas Motor Coaches, Inc.* v. *Railroad Commission of Texas et al.*, 41 S. W. (2d) 1074.

The collateral attack rule has no application.

—*Texas Liquor Control Board* v. *Cannon*, 147 S. W. (2d) 927.

IV.

The Doctrine of *Pari Delicto*

It is indeed a result startling to respondent that petitioner, who asserts and confesses to the suggestion and instigation of an illegal transaction, should profit thereby.

Respondent has never asserted a wrongful intent in the transactions here involved and now earnestly asserts its good faith in entering into the contract in question.

It is submitted that the record shows that in fact respondent relied upon the representations of petitioner and his counsel in permitting the contract to be formulated as was done. An important fact has been overlooked by this Court and a misstatement of fact made in the opinion where it is stated that, "Petitioner and Respondent entered into a written contract under which the Petitioner was to transpor goods for Respondent by truck entirely within the State of Texas at '*such rates, charges, or tariffs as may be fixed by the Railroad Commission of the State of Texas*'."

The contract in fact provided for the payment of rates, charges or tariffs as may be fixed by the Commission, "*for*

the kind and character of services to be rendered hereunder" (R. 155, 156).

In the light of the record of the *insistence* by counsel for petitioner that the Railroad Commission had *not* fixed rates for the special kind and character of service to be rendered by petitioner, we insist that these words in the contract are important and material; they explain the reason for the supplemental contract which did provide a definite method of arriving at compensation to be paid petitioner. The supplemental contract was predicated upon the assertion that applicable rates were not established. It was therefore necessary to agree upon compensation to petitioner which was fixed upon the cost plus basis. Respondent may have carelessly or inadequately investigated the facts of the matter but any confession of bad faith by petitioner should not extend or be imputed to respondent.

We say that petitioner should not profit by his confessed bad faith and fraud, and such is the present result, because respondent gained nothing at the expense of the public from the transaction involved in this case. The service petitioner rendered was one that respondent had theretofore performed for itself. There was no question of, or occasion for, avoiding rates fixed by the Railroad Commission. Respondent could have continued its self service with petitioner as its employee. The public was in no manner affected by changing to a cost-plus employment of petitioner who could not, either under his contract or his permit, extend any operation or service respondent had theretofore conducted for itself; could not transport for any other person; could not compete with any other carrier.

We sincerely urge that these facts take this case out of the "public policy" exception to the rule that a person may not take advantage of his own wrong.

CONCLUSION

For the foregoing reasons, which we believe material, respondent respectfully prays for a rehearing herein and that mandate be stayed, pending consideration hereof.

Respectfully submitted,

GENERAL MILLS, INC., *Respondent.*
By ALFRED MCKNIGHT,
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IRA BUTLER,
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Fort Worth, Texas,

CHARLES E. FRANCE,
First National Building,
Oklahoma City, Oklahoma,
Attorneys for Respondent.

Charles E. France,

Certificate

Charles E. France of counsel for respondent in the above cause does hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

Charles E. France

Certificate of Service

Charles E. France, one of the attorneys for respondent in the above cause, does hereby certify that a copy of the foregoing Petition for Rehearing was today deposited in the United States mail, postage prepaid, in an envelope addressed to Messrs. C. A. Morgan and T. S. Christopher, attorneys of record for petitioner, First National Bank Building, Fort Worth 2, Texas.

January 24, 1947.

Charles E. France

0-6

SUPREME COURT OF THE UNITED STATES

No. 79.—October Term, 1946.

Leo H. Steele, Petitioner, v. General Mills, Inc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 6, 1947.]

Mr. Justice Black delivered the opinion of the Court.

Petitioner and respondent entered into a written contract under which the petitioner was to transport goods for respondent by truck entirely within the State of Texas at "such rates, charges, or tariffs as may be fixed by the Railroad Commission of the State of Texas." Based on that contract petitioner applied to the Commission for a permit to operate as a contract carrier pursuant to rules of the Railroad Commission promulgated under Texas law which grants regulatory power over transportation to that Commission. Article 911 (b), §§ 1 to 22 (b), Rev. Stat. of Tex. Petitioner's application stated that "the tariff to be charged for the service proposed will be that as promulgated by the Railroad Commission of Texas." After notice and hearing, at which petitioner and a representative of respondent testified, the Commission made an order which stated that "After carefully considering the evidence, the laws and its own rules and regulations," the Commission was of the opinion that "the character of business proposed to be done by the applicant strictly conforms with the definition of a contract carrier." The order directed that petitioner be granted a permit, which was later issued, to transport goods for respondent in Texas, but directed attention to the fact that the Commission's "tariffs and orders prescribed as a minimum rate to be charged by contract carriers the rate prescribed for common motor carriers." Later, pursuant to a prearrangement, the parties entered a supplemental agree-

ment concerning which the Railroad Commission was kept uninformed, in accordance with which respondent actually paid petitioner for carriage of its goods less than the rates prescribed for common motor carriers. About three and a half years later the petitioner filed this suit, of which the District Court had jurisdiction by reason of diversity of citizenship, to recover the full rate fixed by prior general orders of the Commission prescribing common carrier rates as provided in the contract.

The respondent's answer admitted that it had paid less than the tariff rate fixed in prior general orders, but denied legal liability to pay that rate on several grounds. It denied that respondent's rates were governed by the Commission's prior general rate orders or by the special order granting petitioner a permit as a contract carrier. It also claimed that a State two-year statute of limitations barred recovery for part of the amount claimed. It further alleged that petitioner had led respondent to believe that his type of transportation was not subject to regulation by the Railroad Commission, and that no prior general or special orders had fixed petitioner's transportation rates. In reliance upon the petitioner's representations, respondent alleged, it had entered into the supplemental agreement to pay less than the tariff rate here claimed. Respondent pleaded that by this conduct petitioner was estopped from claiming that the Commission had power to or has fixed a rate for petitioner's transportation, or from predicating his cause of action upon the Commission's tariffs.

The District Court rejected all of respondent's contentions. Citing Texas statutes, court decisions, and the Commission's practices, the District Court held that the cause of action was not barred by the statute of limitations; that the Commission's prior general rate orders governed the charges to be fixed by contract carriers such as petitioner; that Texas law barred respondent from any

collateral attack on the validity of the orders; that had the rate fixing orders been directly attacked, as authorized by law, they would have been held valid; that shippers and carriers could not by private agreements defeat the State's statutory purpose to require payments of uniform transportation rates; that the original agreement to pay the Commission-fixed rate was valid, and the supplemental agreement to pay less than that rate was void; and that, under Texas law, petitioner was not estopped to rely on the Commission's tariff in order to recover the full tariff rate. Accordingly, the District Court directed the jury to return a verdict for petitioner for the balance due it under the Commission rate, and a judgment for the petitioner was entered on that verdict.[1]

The Circuit Court of Appeals, one judge dissenting, reversed. 154 F. 2d 367. The majority concluded that petitioner should not recover because the agreement to pay less than the full rates was a subterfuge, that neither party had any intention of living up to the agreement, and that their conduct amounted to a fraud upon the Railroad Commission, "contrary to good morals and that [it] tended to interfere with the purity of the administration of the law, such as puts both parties *in pari delicto* with no right to seek advantage of recovery . . ." on the "spurious" con-

[1] The court permitted respondent to offer evidence intended to show that the petitioner's contract carriage was neither in competition with common carriers nor substantially the same type of services as common carriers performed. This evidence was offered to support respondent's contention that the Commission was without jurisdiction to fix petitioner's rates because, as respondent urged, § 6 aa of the State motor carrier law limited its power to fix contract carrier rates to motor carriers that did compete with or perform substantially the same services as common carriers. These two questions were submitted to the jury, and they made special findings on the issues in respondent's favor. The district court later directed the jury to find for petitioner despite these findings, holding, as set out in the opinion, that the Commission's orders were valid and beyond collateral attack in this case.

tract. The dissenting judge did not agree that the records showed a deliberate purpose to evade the statutes. He further thought that under controlling Texas law and policy the doctrine of *pari delicto* could not be applied so as to have the goods of a Texas shipper hauled in Texas at a less rate than the others were compelled to pay by law. All the judges agreed, however, that the agreement to pay less than the Commission-fixed rates was void.

On petitioner's motion for rehearing the State Attorney General intervened. He contended that the court's decision ran counter to the State's long-established policy against discriminatory transportation rate-cutting, and that if the judgment stood, it would impair the integrity of the State's regulatory system, a primary purpose of which was, he argued, to assure uniform rates to all shippers for substantially the same transportation service. In its opinion denying rehearing, the court reaffirmed its former holding and stated that this was "a suit by one party *in pari delicto criminis*, against another in like situation under a fully executed contract, whereon it was sought to penalize to the extent of $37,000 and to reward the prime offender in like amount." Whether the Circuit Court of Appeals' judgment does undermine the transportation policy of Texas is a question of such importance that we granted certiorari to review the case. — U. S. —.

The District Court specifically held that no part of the claim sued on was barred by the Texas statute of limitations and the Circuit Court of Appeals did not discuss the question. Article 5526 of the Revised Statutes of Texas, on which respondent relies, by its language applies only to actions for debts not "evidenced by a contract in writing." The contract here sued on was "in writing." Respondent has cited no Texas decisions which have considered this statute to be a bar to suits on contracts such as the one here involved. We cannot say that the District Court sitting in Texas erred in holding that no part of the claim was barred

by Article 5526. See *Texarkana & S. Ft. Ry., et al.* v. *Houston Gas & Fuel Co.*, 121 Tex. 594, 51 S. W. 2d 284.

Nor can we say that the District Court and the Circuit Court of Appeals erred in interpreting Texas law to render the supplemental agreement between petitioner and respondent designed to circumvent payment of Commission-fixed rates void and unenforceable. The District Court's holdings that the Commission's rate fixing orders applied to petitioner's business, that they were not subject under Texas law to the collateral attack here made, and that petitioner could not carry respondent's goods at less than the rates fixed were well buttressed by state statutes and court decisions.[2] No arguments here made by respondent or state decisions on which it relies refute the District Court's reasoning or conclusion. The Circuit Court of Appeals has not disagreed with this holding of the District Court sitting in Texas. Under these circumstances we shall leave undisturbed the interpretation placed upon purely local law by a Texas federal judge. *MacGregor* v. *State Mutual Life Assurance Co.*, 315 U. S. 280; *Henderson* v. *Thompson*, 300 U. S. 258, 266; *Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55, 74–75. Therefore we can proceed to consider whether the Circuit Court erred in holding that respondent could escape payment of the Commission fixed rates by application of the doctrine of *pari delicto*.

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[2] The District Court cited the following authorities to support its position: Art. 911b Rev. Stat. of Tex.; General Order No. 1, R. R. Comm. of Tex., Aug. 22, 1931; *Texas Steel Co.* v. *Ft. Worth & Denver C. Ry. Co.*, 120 Tex. 597, 40 S. W. 2d 78; *Greer* v. *R. R. Comm. of Tex.* (Tex. Civ. App.) 117 S. W. 2d 142; *St. Louis I. M. & S. Ry.* v. *Londa & Storey* (Tex. Civ. App.) 187 S. W. 358; *R. R. Comm. of Tex.* v. *Uvalde Construction Co.* (Tex. Civ. App.) 49 S. W. 2d 1113; *Alpha Petroleum Co.* v. *Terrell*, 122 Tex. 257, 59 S. W. 2d 364; *Mingus* v. *Wadley*, 115 Tex. 551, 285 S. W. 1084. It also cited the following federal cases: *Burford* v. *Sun Oil Co.*, 319 U. S. 315; *United Fuel Gas Co.* v. *R. R. Comm.*, 278 U. S. 300.

Respondent does not refute what the Texas courts have frequently decided, that agreements by railroads to cut charges to below tariff rates are unlawful and that no doctrine of estoppel or *pari delicto* can be invoked to defeat payment of the full tariff rate. In *Texas & N. O. R. R.* v. *Yates*, 139 Tex. 89, 93, 161 S. W. 2d 1050, 1052. The Texas court said, "In a word the purpose of our statutes as they relate to intrastate freight rates is in every essential respect the same as that of the federal statutes which we had under consideration in *Houston & T. C. R. Co.* v. *Johnson* (Tex. Com. App.) 41 S. W. 2d 14, 83 A. L. R. 241." Just as 49 U. S. C. § 41 (3) prohibits rebate and similar devices which might undermine interstate transportation rate systems, so Art. 1690 (*f*), § i of the Penal Code of Texas makes it unlawful for motor carriers to charge less than commission-fixed rates, and Art. 1687 makes it unlawful for railroads to engage in the same practice. No Texas decisions referred to by the Circuit Court of Appeals or by the respondent here indicate that the State's public policy is any different or less effective in protecting the integrity of motor carrier rates than railroad rates. The Texas motor carrier legislation was designed to be a part of a state transportation regulatory system applicable alike to all lines of transportation which represents a "studied effort to prevent, through regulation, unfair, discriminatory, or destructive competition between such authorized carriers as would ultimately impair their usefulness." *Texas & P. R. Co.* v. *R. R. Commission* (Tex. Civ. App.) 138 S. W. 2d 927, 930 *rev'd on other grounds*, 138 Tex. 148, 157 S. W. 2d 162. *Cf. Stevenson* v. *Binford*, 287 U. S. 251, 272–273.

Under Texas law the payment of commission-fixed carrier rates is not merely a private obligation between shippers and carriers. The duty to pay is a public one, *H. & T. C. R. Co.* v. *Johnson* (Tex. Comm. App.) 41 S. W. 2d 14. And, as said in the *Yates* case, *supra*, with reference

to a railroad, no carrier can "by means of estoppel or by any other device' escape the performance of this public duty." While the doctrine of *pari delicto* might be applied in Texas to some types of contracts so as to defeat recovery, see *Wright* v. *Wight & Wight* (Tex. Civ. App.) 229 S. W. 881, we are satisfied that the Circuit Court of Appeals erred in holding that Texas courts would apply it in this case. Application of the doctrine of *pari delicto* in this proceeding, therefore, where the federal court has jurisdiction by reason of diversity, would result in applying a rule of law in the federal courts different from the rule we believe has been applicable in the state courts. Such a result cannot be approved. *Holmberg* v. *Armbrecht*, 327 U. S. 392.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed. It is so ordered.

Reversed.